

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) August 6, 2008
) 2:15 P.M.
)

BEFORE THE HONORABLE **JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(**STATUS CONFERENCE - VIA TELEPHONE**)

APPEARANCES

For the Plaintiff: **RONALD S. GOLDSER, ESQ.**
CHARLES ZIMMERMAN, ESQ.
LEWIS J. SAUL, ESQ.

For the Defendant: **JAMES DAMES, ESQ.**
WILLIAM H. ROBINSON, JR., ESQ.

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

2:15 P.M.

(In chambers via telephone.)

THE COURT: Good afternoon.

MR. GOLDSER: This is Ron Goldser speaking, I forgot to say that first.

THE COURT: That's fine. And how are you, sir?

MR. GOLDSER: I am well. Thank you, and yourself?

THE COURT: Good. Very good.

MR. GOLDSER: You have present on the call -- this is the Levaquin MDL 1943, in the event that the reporter is starting to take things down. This is Ron Goldser speaking. You have on the call for plaintiffs Charles Zimmerman, who is on his cell phone and is very soft and will not likely say much because he cannot be heard, Lewis Saul from Portland, Maine, and myself.

And on behalf of the defendants, you have John Dames from Drinker Biddle in Chicago who will be doing most of the speaking, and Bill Robinson from Alexandria, Virginia, who is patched in through Mr. Dames's phone and also is hard to be heard by the reporter, so he will probably not be speaking much as well.

We're happy to initiate this conversation, Your Honor, unless you have some things that you would prefer to discuss with us first.

1 THE COURT: No. I'm just glad we could have an
2 informal status conference here. I would like to start
3 moving towards a formal status conference where everyone is
4 in the courtroom, but let's see.

5 Do you have an agenda for us, Mr. Goldser?

6 MR. GOLDSER: I do, sort of, and of course
7 defense counsel and plaintiffs have talked about this in
8 advance of today. We would like to talk about scheduling
9 the status conference. We would like to talk about the
10 current state of affairs with our draft pretrial order
11 number one that we have been working on between and among
12 ourselves.

13 We can talk about some of the additional pretrial
14 orders that we envision coming down the road. We can give
15 you some idea of some of the discovery types of issues that
16 are out there, not that we're going to debate or decide any
17 of those today, but at least it will give you a flavor of
18 what is going on and what will be on the agenda for the
19 first status conference when we have it set.

20 Those were some of the things we have on our mind
21 that we would like to present to you, but really the goal
22 of this call is to get a status conference scheduled if we
23 can.

24 THE COURT: Sounds good. What kind of timing are
25 all of you thinking about, sometime in September?

1 MR. GOLDSER: Well, Your Honor, Ron Goldser
2 again. I am fortunate enough to be out of the country from
3 September 5 through September 25. So if there is any
4 possibility of doing it before that, that would be
5 wonderful. Otherwise I would beg everyone's indulgence to
6 await my return.

7 THE COURT: We certainly can do it before,
8 although what day are you leaving?

9 MR. GOLDSER: September 5th, I believe a Friday.

10 THE COURT: I am back on the 3rd from a trip, so
11 there is probably time on the 4th. Other than that, we
12 would be in a couple weeks from now, which is probably
13 pretty quick still or after you return. What about the
14 rest of your schedules?

15 MR. DAMES: Your Honor, John Dames. The 4th is
16 fine by me. I don't -- if Bill Robinson has a problem with
17 that, he will object, and I will be able to relay it, but I
18 haven't heard anything yet.

19 MR. SAUL: Lewis Saul, and September 4th is fine
20 for me.

21 MR. ROBINSON: No problem.

22 THE COURT: So that sounds good for everybody,
23 then. Let's go ahead and schedule it for the 4th of
24 September. Now, in terms of timing of the day to make life
25 convenient for travel, I suppose early afternoon, does that

1 sound the best?

2 I guess, Mr. Robinson, you're probably coming
3 from the farthest away.

4 MR. ROBINSON: Bill Robinson, Your Honor, and
5 that's fine with me. Anytime during that day would be
6 acceptable.

7 THE COURT: If we set that at, say, two o'clock
8 in the afternoon, would that work?

9 MR. DAMES: Fine for the defendants.

10 MR. GOLDSER: Your Honor, for plaintiffs, I
11 expect we can work readily with that. One of the things
12 that you will hear us talk about in a few minutes is the
13 plaintiffs steering committee, and I have advised the folks
14 who we have organized with that it would be beneficial for
15 them to attend the first status conference if for no other
16 reason for them to meet the Court and for the Court to meet
17 them.

18 So I will put out the call to them and let them
19 know that that's the proposed date and time, and I'm sure
20 they will be able to work around it.

21 THE COURT: If the time turns out to be
22 inconvenient for anyone, the schedule is fairly wide open
23 that day, so we can go earlier. We can go later. Just let
24 us know.

25 MR. GOLDSER: We have a proposed pretrial order

1 number one that we have been working on. We have taken
2 much from some of the recent MDL cases that have landed in
3 the District of Minnesota, most particularly and most
4 recently, Judge Kyle's pretrial order number one in the
5 Medtronic leads case.

6 There are a number of things in it that we're
7 having some questions or some issues with, and so I can
8 highlight those, and we can present to you what we have
9 agreed upon leaving out those items or perhaps you can
10 direct us on how you would like to approach them.

11 Perhaps the first and easiest, we did not want to
12 be presumptuous enough to suggest that you were in fact
13 going to invite a magistrate judge to join you in this
14 case. We didn't know what your wishes were, so we didn't
15 want to add that language or omit that language without
16 asking first, so we ask your pleasure.

17 THE COURT: My intent on that is to utilize a
18 magistrate judge probably in a special master role, either
19 relative to discovery if that becomes necessary or with
20 regard to resolving cases and then handle the rest of it
21 myself, or if a particular, you know, significant project
22 comes up and it's difficult for me to handle, I would ask
23 the magistrate judge's assistance, but by and large my plan
24 is to handle most of it myself.

25 MR. GOLDSER: This is Ron Goldser again. I have

1 not personally been on the front lines with the St. Jude
2 Silzone Heart Valves Litigation, but I understand that's
3 pretty much the way you handled that litigation as well.

4 THE COURT: That's correct, and that worked well.

5 MR. ZIMMERMAN: Judge, I am sorry. This is Bucky
6 Zimmerman. My phone just dropped off. I just joined back
7 on.

8 THE COURT: Welcome.

9 MR. ZIMMERMAN: Thank you.

10 MR. GOLDSER: So in the first pretrial order, do
11 you want us to include some language appointing a
12 magistrate judge, or shall we omit that for the present?

13 THE COURT: Let's omit that for the present.

14 MR. GOLDSER: Okay. Will do. We have proposed
15 in the first pretrial order a plaintiffs' organizational
16 structure with lead counsel, co-lead counsel, liaison
17 counsel and steering committee members. There is a
18 relatively small group of plaintiffs' lawyers who are
19 involved in this litigation. We have reached out to
20 everyone of whom we are aware and invited anyone and all of
21 them to join on the steering committee if they so chose to
22 do so.

23 So the ones who have stepped up and said they
24 would like to be on the steering committee are the people
25 whose names appear in our draft of the pretrial order. I

1 don't know whether you would just be willing to accept
2 that, whether you would like to open that issue up for
3 petition by individuals, whether you would be willing to
4 accept that subject to people submitting their personal
5 biographies for your review to ensure that people are
6 properly credentialed.

7 Can you help us with that one?

8 THE COURT: Yeah, I would, in all likelihood, I
9 would accept it, but I would like to have the biographical
10 material from everyone, and I feel that one of my
11 obligations is to do a little bit of due diligence on it,
12 but I will accept your proposal, along with the
13 biographical materials, and look at it quite quickly.

14 MR. GOLDSER: I will get those biographical
15 materials assembled. People are aware of the potential
16 that they have to do that, so it shouldn't take me too long
17 to do that. The third question that arose in the draft
18 that we have been working on is a question about multiple
19 plaintiffs filing on one complaint.

20 We sort of reached a loggerheads on this weighty
21 and mighty issue. Plaintiffs would like to have multiple
22 plaintiffs file in one complaint, limited to those who come
23 from the same federal jurisdiction in the event there is a
24 remand either through the MDL or a venue transfer under
25 Section 1404, which as I understand is kind of the current

1 guise of the way that various cases have decided that
2 issue, and defendants have declined for their reasons to
3 agree to that proposition.

4 So from our perspective, I think we will probably
5 omit that, but it does seem to be an issue that we will
6 want the Court to address at some point in the relative
7 near future. I don't know if Mr. Dames would like to
8 address that subject at this point.

9 MR. DAMES: No, I mean, I don't need to argue the
10 issue. Our position is that we would like to maintain the
11 separate complaints for each plaintiff and each cause of
12 action brought by the plaintiffs. They're very different
13 as we've learned from the litigation to date, and so we
14 would like maybe just, if the Court wants to hear brief
15 argument on the issue, we would be prepared to do it at the
16 first status conference.

17 THE COURT: I think that would be a good idea.
18 Let's be prepared to discuss that issue at the first status
19 conference. We will get that resolved right away.

20 MR. GOLDSER: All right. May we submit something
21 in writing so you have a little bit of background, at least
22 on some of the cases where that issue has been addressed?

23 THE COURT: Absolutely. If both sides could
24 submit something in writing before the first status
25 conference, and then obviously if there is any need for a

1 response, you will have that opportunity at the status
2 conference.

3 MR. GOLDSER: Okay.

4 MR. DAMES: Thanks, Your Honor.

5 MR. GOLDSER: We wanted to let you know that
6 there are several other orders that we anticipate
7 presenting to the Court for its consideration fairly early
8 on. One will be a fairly standard deposition protocol
9 order. We haven't started working on that one yet, but it
10 has occurred to me that we probably should have that in
11 place.

12 This is despite the fact that we have taken about
13 six depositions so far in this litigation. You will
14 recall, Your Honor, of course that this case has been going
15 on in your courtroom for about two years already. We have
16 gotten fairly far down the road in some of the discovery,
17 and there is some that remains to be done. Some
18 depositions have been taken.

19 Quite a number remain, and so we should have some
20 rules of the road for depositions. Although we haven't had
21 any problems to date in any depositions, it never hurts to
22 have a deposition protocol order, and we will work on one
23 and submit one.

24 The other order that usually gets entered at this
25 stage or early stage of the proceedings and has been a

1 particularly thorny issue in some recent cases is the
2 question of plaintiffs' attorneys' fees, assessments and
3 costs and cost sharing.

4 The proposed PSC has met and talked about this.
5 We have a proposal. Everybody that we have talked with has
6 agreed to it at least orally. We don't have anything in
7 draft yet, but I expect to be drafting that and circulating
8 it around on the plaintiffs' side. Obviously the defense
9 can weigh in on it.

10 I'm not sure that they have much of a dog in that
11 hunt, but they of course have the opportunity to weigh in,
12 and we will be presenting that to you in relative short
13 order. I don't know whether we will have either one or
14 both of those by the first status conference, but we will
15 certainly try to do that.

16 THE COURT: Good.

17 MR. GOLDSER: I'm not aware of any other orders
18 that come readily to my mind that we should have available
19 and presented at the first status conference, but if there
20 are some, reviewing some of the other MDL's, I'm sure that
21 I will be talking to Mr. Dames and Mr. Robinson about them,
22 and if we can work up appropriate orders, we will present
23 them at the status conference if we're ready to.

24 THE COURT: That would be fine.

25 MR. GOLDSER: Finally, at least to my agenda,

1 things that were on my mind, I just wanted to highlight for
2 you some of the discovery issues that are out there that we
3 may very well need to get some help with. One is a,
4 defense wants to stay discovery pending the entry of
5 pretrial order number one. I'm hoping that issue becomes
6 moot with the entry of a proposed order in short order
7 here.

8 A second is the question of what we call search
9 terms. We may have certainly had a disagreement or
10 misunderstanding about the factual predicate for this, but
11 we have argued this already to some extent in front of
12 Magistrate Judge Boylan that we, the plaintiffs, believe
13 that the defendants have used certain terms in their
14 electronic search of documents to produce documents and to
15 figure out which documents to produce.

16 They provided to us those terms that they used.
17 We believe that there should be other terms that are used
18 for searches, and so we would like to be able to present
19 that issue to the Court, and obviously defense has their
20 perspective on that.

21 As a subset of that issue, we have really refined
22 one issue that is going to be a very important one, and
23 this one will take a little bit of scientific background,
24 but I will give it my best shot anyway. The drug Levaquin
25 is the drug that is at issue in this case. It is a

1 successor drug to a drug that was called Floxin,
2 F-l-o-x-i-n.

3 The issue or the injury that results from both of
4 these drugs relative to this litigation is tendon rupture,
5 primarily Achilles tendon rupture, tendonitis as well.
6 There is a fair amount of epidemiological study on the
7 relationship between Floxin and tendonitis and tendon
8 rupture. There is some epidemiological study on Levaquin
9 and its relationship to tendonitis and tendon rupture, but
10 there is less.

11 Plaintiffs' position is that those two drugs are
12 substantially similar given their biochemical makeup and
13 their absorption and pharmacology in the body so that the
14 epidemiology of Floxin as the predecessor drug is relevant
15 to predicting the epidemiology of Levaquin.

16 Defendant disagrees and believes that they are
17 two completely separate drugs and that the epidemiology of
18 Floxin is not relevant to the epidemiology of Levaquin.
19 That's the important issue, and we have talked about it.
20 We have tried to figure out a way to resolve it, and again,
21 I won't presume to speak entirely for Mr. Dames, but my
22 understanding is that they would like not only to present
23 that on formal motion, they would like to present that even
24 with evidentiary testimony of experts.

25 THE COURT: Have experts been secured in this

1 area yet?

2 MR. GOLDSER: I believe that defendant has an
3 in-house medical expert or former employee, now retired.
4 Plaintiffs are working on that issue. We have at least one
5 expert that we are working with, although we are not
6 prepared to present his testimony immediately. It will be
7 at least 30 days until we are, probably closer to 60 before
8 we're ready to do that.

9 We have further discovery we want to do on the
10 issue, the continued deposition of defendants' medical
11 witness. Part of that was taken already. Part of it was
12 not. We're going to be speaking tomorrow, Mr. Robinson and
13 I, about how do we sequence the briefing and pleadings to
14 raise this motion so that we can all do what we need to do
15 to get it properly before the Court.

16 MR. DAMES: Your Honor, John Dames. At least
17 procedurally, that is a reasonable summary of where we're
18 at. Substantively, there has been a bit of discovery taken
19 on that issue from one of defendants' experts, former
20 employee witness, and, you know, I think it's also a fair
21 summary to say that that witness failed to support or
22 provide any support for the theory that the drugs were
23 related.

24 So there is anticipated need from, from
25 plaintiffs to take further testimony of that witness, but

1 we clearly want to be heard and have the full opportunity
2 to present the information and the evidence to the Court
3 for its decision on this issue.

4 THE COURT: Well, that sounds good. What we will
5 do probably is discuss, if we have progressed to that point
6 where we can set up a briefing schedule and a hearing date
7 for this issue, we can discuss that on the 4th when we
8 gather together. If it's not prime or ready yet for
9 resolution, we can set it out a little bit farther into the
10 future.

11 MR. GOLDSER: Okay. I just wanted to alert the
12 Court to the fact that this issue is out there. It's
13 important. We're working on it. It may well involve
14 evidentiary testimony, and we will want to pay attention to
15 that one because it will have some significant
16 ramifications for the case overall.

17 THE COURT: Certainly, and I anticipate that the
18 parties are unlikely to agree on this issue.

19 MR. GOLDSER: I think you're right.

20 MR. DAMES: That would be fair.

21 THE COURT: Okay.

22 MR. GOLDSER: There are several other issues not
23 quite as important. We have some confidentiality
24 designations that the defendant has taken when they
25 produced documents. They have agreed to D designate or

1 review those designations and D designate those that were
2 improvidently taken. Still waiting for that to happen.
3 Like to perhaps nail that down in terms of a deadline. Not
4 a huge issue.

5 We talked on the plaintiffs' side about whether
6 we should have a master complaint. Don't know if the Court
7 has any feelings about whether we should have a master
8 complaint. I don't know that we need to discuss that now,
9 but we can, but we can put that perhaps on the first status
10 conference agenda. The usual plaintiffs' fact sheet and
11 defendants' fact sheet that we have agreed among us we
12 should have them.

13 Plaintiffs have started drafting a defendants'
14 fact sheet, and I presume the defendants have started
15 drafting a plaintiffs' fact sheet, and so we are working on
16 that issue, and hopefully that will be resolved between us
17 by agreement in the relative near future. Those are the
18 things I see at this stage of the proceeding.

19 As you can see, we are making progress. We are
20 working quite well together so far to do these things.
21 When we disagree, so far the disagreements have been
22 friendly although firm, and where we're still -- we're
23 still breaking bread with each other.

24 THE COURT: That sounds good.

25 Mr. Dames or Mr. Robinson, did you have anything

1 you would like to add today?

2 MR. DAMES: Your Honor, the only thing that I
3 should add for future consideration is that you have heard
4 a description of the discovery in brief taken so far. It
5 has been essentially from the defendants. We have -- there
6 has been a prohibition, temporary as it is, for defendants
7 to take the depositions of plaintiffs' prescribing
8 physicians.

9 I would love an opportunity to address how we
10 would look to open that up and begin to be able to take
11 depositions of plaintiffs' prescribers and probably start
12 that process as soon as we, as soon as we can, but that can
13 certainly await the conference.

14 THE COURT: Okay. Well, let's put that on the
15 agenda for the conference. Okay. Anything else,
16 Mr. Dames?

17 MR. DAMES: Not that I could think of, and I
18 don't hear any murmurs from Bill so far.

19 MR. ROBINSON: Nothing from me. Thank you.

20 THE COURT: That sounds good. Mr. Saul, did you
21 have anything?

22 MR. SAUL: I'm sorry, Your Honor?

23 THE COURT: Okay. I think we all --
24 Mr. Zimmerman, anything you would like to add?

25 MR. ZIMMERMAN: No. No, Judge, not really. I

1 think that the only issue that I want to alert the Court
2 to, however, is the issue of attorneys -- can you hear me?

3 THE COURT: Yes.

4 MR. ZIMMERMAN: The issue of attorney's fees and
5 assessments. It's a particularly interesting issue with a
6 lot that is going on in our district. So Ron might be a
7 little optimistic when he says we have something at hand.
8 I would put a little more thought and consideration into
9 this because it interplays with so much that is going on
10 with some of the other members of our bench, and so I just
11 want to make sure that I'm not premature on that because it
12 is a little bit of a moving target today.

13 THE COURT: Okay. That sounds good. Okay.
14 Anything else for today?

15 MR. GOLDSER: Ron Goldser. No. Thank you very
16 much for hearing us today. We appreciate that, and we
17 appreciate getting scheduled for September 4th at two
18 o'clock. We will have for you an agenda in advance, and we
19 will have for you some letter briefs on the question of
20 multiple plaintiffs filing on one complaint.

21 THE COURT: That sounds good. Glad to have you
22 all on board, and we will look forward to the hearing on
23 the 4th.

24 MR. DAMES: Thank you, Your Honor.

25 MR. ROBINSON: Thank you, Your Honor.

1 MR. SAUL: Thank you, Your Honor.

2 MR. ZIMMERMAN: Thanks, Judge.

3 MR. GOLDSER: Okay. Thank you.

4 * * *

5 I, Kristine Mousseau, certify that the foregoing
6 is a correct transcript from the record of proceedings in
7 the above-entitled matter.

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11 Certified by: s/ Kristine Mousseau, CRR-RPR
12 Kristine Mousseau, CRR-RPR

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